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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

FEDERAL TRADE COMMISSION,
Plaintiff,
v.
MICROSOFT CORP., et al.,
Defendants.

Case No. 3:23-cv-02880-JSC

**NON-PARTY SONY
INTERACTIVE
ENTERTAINMENT LLC'S
NOTICE OF MOTION AND
FOURTH ADMINISTRATIVE
MOTION FOR SEALING AND
IN CAMERA TREATMENT**

The Honorable Jacqueline Scott
Corley

1 **TO ALL PARTIES AND THEIR RESPECTIVE COUNSEL OF RECORD:**

2 PLEASE TAKE NOTICE THAT non-party Sony Interactive Entertainment
3 LLC (“SIE”) will, and hereby does, move this Court to seal from public disclosure
4 and permit *in camera* treatment of an exhibit that appears on Defendants’ exhibit
5 list.

6 **REQUESTED RELIEF**

7 SIE requests that the Court seal from public disclosure and permit *in camera*
8 treatment of the exhibit identified in the table below.

I. INTRODUCTION

Non-Party Sony Interactive Entertainment LLC (“SIE”) requests that this Court seal from public disclosure and permit *in camera* treatment of limited, highly sensitive business material. This sensitive material appears in a document on Defendants’ exhibit list and was introduced into evidence earlier today at the June 27 hearing.

SIE produced voluminous material in discovery in the underlying Federal Trade Commission proceeding in reliance on a strict protective order that prevented public disclosure. *In the Matter of Microsoft / Activision Blizzard*, FTC Docket No. 9412 (“FTC Action”). This material includes some of SIE’s most sensitive business planning, pricing, strategy, and otherwise sensitive documents. Good cause exists for sealing and providing *in camera* treatment to protect SIE’s legitimate confidentiality interests. In recognition of the public nature of these proceedings, Non-Party SIE has made a good faith effort to limit its request to the most sensitive material.

II. BACKGROUND

On June 19, 2023, the Parties provided preliminary notices to SIE identifying the documents produced by SIE in the underlying FTC Action that the Parties may introduce into evidence during the evidentiary hearing in this matter. As relevant to the present motion, Defendants’ preliminary notice listed Exhibit RX0070 with beginning Bates number SIE-MSFT-10744729 and ending Bates number SIE-MSFT-10744729. On June 21, SIE filed a motion requesting sealing and *in camera* treatment for certain documents on the Parties’ exhibit lists. (ECF No. 172). This motion did not request sealing for the RX0070 identified in Defendants’ preliminary notice, defined as a one-page document bearing Bates number SIE-MSFT-10744729. It became apparent, however, after receiving the Parties’

proposed video deposition testimony of Jim Ryan on June 26, 2023 and June 27, 2023 that they had intended to include additional pages as part of RX0070. Specifically, the proposed video included a screenshot from a page of RX0070 not included in the one page previously identified. In addition, Defendants filed their Amended Statement of Witnesses and Evidence for June 27, 2023, which lists RX0070 (ECF No. 231). On June 27, after being alerted to the difference between the exhibit list and what apparently had been intended, Microsoft's counsel agreed that the additional pages would not be shown in the public video at the Hearing. SIE accordingly files this motion to maintain confidentiality over those additional pages.

The material SIE seeks to protect contains competitively sensitive nonpublic information that would injure SIE if made publicly available. The table below describes the SIE confidential material found in this document and the specific bases supporting sealing of the information. *See* Civ. L.R. 79-5(c). The proposed treatment noted in the table reflects SIE's good faith effort under expedited circumstances to seek the sealing only of information that is confidential, commercially or competitively-sensitive, and cannot be protected from public disclosure through less restrictive means. SIE makes this request pursuant to Civil Local Rules 7-11 and 79-5.

| Document | Information Requested for <i>In Camera</i> Treatment | Description of Confidential Information Requiring <i>In Camera</i> Treatment |
|---------------------------------|--|---|
| Plaintiff's Exhibit List | | |
| RX0070 | Redacted Version Provided to Parties | This exhibit contains non-public and highly sensitive information including, but not limited to, information about SIE's approach to contract negotiations with third party partners and discussions of particular contract |

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| | | |
|--|--|---|
| | | terms with particular partners; information about SIE's business strategies, competitive business plans, future investment plans, console and product development plans, product roadmaps, innovation plans; and business analysis regarding competitors' and commercial partners' behavior and products. |
|--|--|---|

II. THERE ARE COMPELLING REASONS TO SEAL SIE'S CONFIDENTIAL BUSINESS INFORMATION AND PROVIDE FOR IN CAMERA TREATMENT

Although the public enjoys a general right to inspect and copy public records, including judicial records, "access to judicial records is not absolute." *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). The presumption in favor of access to judicial records may be overcome by "compelling reasons" that justify sealing them, such as the need to prevent court filings from serving as "sources of business information that might harm a litigant's competitive standing." *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016) (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598-99 (1978)). Courts have broad discretion to prevent disclosure of "many types of information, including, but not limited to, trade secrets or other confidential research, development, or commercial information." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002). Specifically, if revealing "confidential business material, marketing strategies, [and] product development plans could result in improper use by business competitors seeking to replicate [the company's] business practices and circumvent the time and resources necessary in developing their own practices and strategies," a court may seal the materials in question. *Roley v. Google LLC*, No. 18-cv-07537-BLF, 2020 WL 13517498, at *1 (N.D. Cal. Apr. 28, 2020) (quoting *Algarin v. Maybelline, LLC*, No. 12CV3000 AJB DHB, 2014 WL 690410, at *3 (S.D. Cal. Feb. 21, 2014)).

1 Non-parties receive special deference when these issues are considered. *See*,
 2 *e.g.*, *United States v. Bazaarvoice, Inc.*, No. 13-cv-00133-WHO, 2014 WL
 3 11297188, at *1 (N.D. Cal. Jan. 21, 2014) (granting motion to seal third-party trial
 4 exhibits, noting that disclosure would “chill investigations in the future where third
 5 party documents are essential”).

6 *In camera* review of sealed documents is an appropriate means for the Court
 7 to protect these important interests. *See United States v. Bazaarvoice, Inc.*, No. 13-
 8 cv-00133-WHO, 2014 WL 203966 (N.D. Cal. Jan. 8, 2014) (citing throughout to
 9 exhibits reviewed *in camera* in merger trial).

10 Here, Non-Party SIE seeks sealing and *in camera* treatment for limited non-
 11 public information containing SIE’s highly confidential analyses and business
 12 strategy information related to its consoles, subscription services, and cloud gaming
 13 businesses. *See* Ex. 1 (Decl. of C. Svensson).¹ In particular, the information that SIE
 14 seeks to protect includes:

- 15 • Non-public information about SIE’s approach to contract negotiations with
 16 third party partners and discussions of particular contract terms with
 17 particular partners;
- 18 • Non-public information about SIE’s business strategies, competitive business
 19 plans, future investment plans, console and product development plans,
 20 product roadmaps, innovation plans; and
- 21 • Non-public SIE business analysis regarding competitors’ and commercial
 22 partners’ behavior and products. *See id.* ¶ 3.

23
 24
 25 ¹ The Declaration of Christian Svensson was previously submitted at ECF 172-1 in conjunction with Non-Party SIE’s
 26 Administrative Motion for Sealing and *In Camera* Treatment (ECF 172). The competitively sensitive issues in
 27 today’s request are the same as those addressed in the Declaration previously submitted, as explained in the chart
 28 above, and Mr. Svensson’s Declaration is resubmitted here as Exhibit 1.

1 SIE uses this information to operate its business and shape its future strategy.
 2 As explained in the accompanying declaration, if these business secrets were made
 3 available to the public, SIE’s competitors could use these secrets to inform their own
 4 strategies to gain an unfair advantage in competing with SIE. *See id.* ¶¶ 4-8. Business
 5 partners could likewise gain an unfair advantage in their relationships with SIE by
 6 understanding SIE’s strategic objectives, negotiation tactics, and relationships with
 7 other business partners. *See id.*

8 In short, the information should be sealed because disclosure would undermine
 9 SIE’s business, give competitors and business partners an unfair advantage, and
 10 disrupt the future launches of its commercial products. *See Ex. 1.; see also*
 11 *Synchronoss Techs., Inc. v. Dropbox Inc.*, No. 16-cv-00119-HSG, 2018 WL
 12 6002319, at *1 (N.D. Cal. Nov. 15, 2018) (noting that courts have sealed confidential
 13 business information when it “prevent[ed] competitors from gaining insight into the
 14 parties’ business model and strategy”) (citation omitted); *Bauer Bros. LLC v. Nike,*
 15 *Inc.*, No. 09cv500-WQH-BGS, 2012 WL 1899838, at *2 (S.D. Cal. May 24, 2012)
 16 (concluding that “public disclosure of Nike’s confidential business
 17 materials . . . could result in improper use by business competitors seeking to
 18 replicate Nike’s business practices and circumvent the considerable time and
 19 resources necessary in product and marketing development”).

20 **III. THE COMPELLING REASONS TO SEAL OUTWEIGH ANY** 21 **PUBLIC INTEREST IN PUBLIC DISCLOSURE**

22 SIE’s request for sealing and *in camera* treatment is the result of its good faith
 23 effort to seek the sealing only of information that is confidential, commercially or
 24 competitively-sensitive, and cannot be protected from public disclosure through less
 25 restrictive means. SIE has proposed redactions over sealing where possible, and has
 26 endeavored to propose the narrowest possible redactions in the time permitted. Any

1 public interest in disclosing this information is outweighed by the prejudice that will
 2 result to SIE, a non-party, if no protection is granted. *See Bazaarvoice, Inc.*, 2014
 3 WL 11297188, at *1 (noting importance of protecting third parties).

4 **IV. CONCLUSION**

5 For the foregoing reasons, SIE respectfully requests that the Court grant
 6 SIE's motion and seal and review *in camera* the SIE confidential information
 7 contained in the exhibit identified above.

8
 9
 10 Dated: June 27, 2023

11 Respectfully submitted,

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 HAMILTON LLP

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